United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

76-2089-2094

To be argued by
JANET CUNARD

United States Court of Appeals
FOR THE SECOND CIRCUIT

BRIAN S. FIELDING,

Petitioner-Appellant-Appellee,

against

EUGENE LE FEVRE, Superintendent of Greenhaven Correctional Facility, BENJAMIN WARD, Commissioner of the Department of Correctional Services of the State of New York and Louis Lefkowitz, Attorney General for the State of New York,

Respondents-Appellees-Appellants.

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P/S

BRIEF OF RESPONDENT-APPELLEE-APPELLANT

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BRIEF OF RESPONDENT-APPELLEE-APPELLANT

Facts

BRIAN FIELDING, the head coach of the Mamaroneck Lions of the Pee Wee Division (10-12 years of age) of the Pop Warner Football League committed sodomy on and otherwise sexually abused a number of the boys on his team.[1]

As one of the victims of the defendant's crimes was the grandson of the Administrative Judge of the Ninth Judicial District, and so that the defendant would not be tried by a judge responsible to him, the Appellate Division of the

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[1] By indictment No. 26/74, the defendant was charged with the crimes of Sodomy in the second degree (seven counts); Sexual Abuse in the second degree (24 counts); Sexual Misconduct (seven counts) and Endangering the Welfare of a Child (14 counts).

The defendant was convicted of the crimes of Sodomy in the second degree (seven counts); Sexual Abuse in the second degree (six counts) and Endangering the Welfare of a Child.

Second Department with the consent and concurrence of the Third Department assigned a judge from Albany County to preside at the trial. On October 15, 1974, Judge Clyne appeared in Westchester County to conduct all proceedings relative to the case. It was at that time that a trial date was set and the "off the record" proceedings of which defendant complains took place.

On November 19, 1974, the defendant appeared before Judge Clyne, waived a jury trial and trial commenced. On November 21, 1974, the Judge rendered a verdict finding the defendant guilty of seven felonies and seven misdemeanors.[2] On January 2, 1975, the defendant was sentenced to an indeterminate term of up to seven years on each of the Sodomy counts, the sentences on the first and second counts to run consecutively and the remaining terms (including those on the other counts) to run concurrently.[3] On appeal, the Supreme Court of the State of New York, Appellate Division, Second Department, modified the sentence to make all terms concurrent and as modified affirmed the judgment of conviction. The New York Court of Appeals unanimously affirmed the order of the Appellate Division.[4]

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[2] The other crimes charged in the indictment were deemed to be lesser included offenses and no verdict was rendered by the Court.

[3] The defendant claims (brief, p. 6) that the fact that "the court specified that the sentence be served at Green Haven prison, a maximum security institution" is an indication of the extraordinary harshness of this sentence. What the defendant does not tell the Court is that the judge could not specify the institution at which the sentence was to be served and simply, according to law, remanded the defendant to Green Haven, the only proper reception center at the time, for classification and assignment.

[4] The defendant's other applications to State appellate courts included (1) a pre-trial application for Article 78 relief in the nature of prohibition (unanimously denied); (2) a post appeal motion to the Appellate Division for a discretionary reduction of sentence (unanimously denied); (3) a post conviction application for Article 78 relief in the nature of prohibition (dismissed).

On August 19, 1976, the stays that had continuously been in effect having expired, the defendant was remanded to begin service of his sentence.

POINT I

The defendant's petition for habeas corpus relief should have been summarily denied.

The District Court, Metzner, J., found that defense counsel's affidavit submitted to the court "raises a necessary inference that the severity of the sentence could have been based in part on the fact that petitioner stood trial" and that in the absence of an affidavit from Judge Clyne, "there is enough to infer that such an improper basis for sentence *may* have existed" (40a). The Court then remanded the matter to Judge Clyne to, in essence, submit the mentioned affidavit. The granting of this relief we suggest was in error and in any event the defendant is entitled to no more.

Stripped of its trappings, the defendant's claim[5] is that, according to his trial attorney, Judge Clyne stated "that even if there were a disposition by way of plea negotiations, that the defendant herein would be incarcerated" and "that should any plea negotiation be rejected, and that the defendant go to trial and be found guilty, that the sentence might be more severe" (138a), and that therefore his sixth amendment rights were violated.

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[5] The defendant also claimed that he was prejudiced by the fact that Judge Clyne was aware of the fact that one of the victims was a grandson of a judge. Why he has not made that very same claim about this Court where that same victim's granduncle was forced to disqualify himself the first time the case appeared, is not known, that is, if the defendant is sincere in his claim. If the defendant's position were correct, it would be "open season" on Mr. Chief Justice Berger, as there would be no judge that would not recognize him as he testified as a victim.

The contentions relating to sentence will be discussed at Point II, *infra*.

Most defendants charged with fifty-two crimes are interested in attempting to dispose of the charges by a plea, and likewise, most defendants want an indication of what the sentence is likely to be prior to entering a plea. Thus, when the case against Brian Fielding first appeared before the judge assigned for trial, Judge Clyne asked about the possibility of the disposition of the indictment by plea. The judge also indicated his thinking on sentence, namely that there would be a period of incarceration upon conviction of a felony and that no lesser plea would be accepted (147a).[6] In considering whether or not to enter a guilty plea, a defendant must also consider the possible results of a trial. Included therein is not only an analysis of the probability of conviction but also of the probable sentence. In the instant case, the defendant did not deny that he committed the acts charged but instead relied upon the defense that statutorily required corroboration was not present. He thus knew that either the charges would be dismissed for legal insufficiency or that he would be convicted of multiple felonies. In the latter case, would the sentence be the same or might it be greater? All things being equal, a man convicted of seven separate felonies should receive a greater sentence than a man convicted of one. Judge Clyne stated that that might be the result. At that point, upon receipt of a plea offer, the defendant had all the facts necessary to make an intelligent decision whether to plead guilty or go to trial.

The defendant went to trial so there can be no contention that the judge's statements coerced him into entering a plea. The defendant can thus only allege that he was punished for going to trial, a specious claim at best.

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[6] That defense counsel, Vincent Lanna, is often interested in obtaining a sentence "commitment" prior to the entry of a plea may be seen from an examination of the record in *People* v. *Selikoff*, 35 N.Y. 2d 227 (1974), cert. den. 419 U.S. 1122; *U.S. ex rel. Selikoff* v. *Commissioner*, 524 F.2d 650 (2 Cir. 1975), cert. den. —— U.S. ——, 148 L.Ed. 2d 194.

Plea bargaining serves a legitimate function in the criminal process and there is no reason whatsoever why a trial judge should not urge the parties to discuss the matter (*Santobello* v. *N.Y.*, 404 U.S. 257 (1971)). The defendant urges the proposition that it is wrong for a judge to become involved in the process and intimates that the trial judge was improperly so involved. Of course, there is no support in the record for his contention. The record shows that at the time of the discussion, the District Attorney had decided on no offer and that the judge merely gave his position on the minimum plea that he would accept (§ 220.10 CPL) and his current thinking on sentence (*People* v. *Selikoff*, *supra*), both items of information necessary for intelligent plea bargaining.

An examination of the papers before the District Court reveals that the statements complained of, if made as alleged by defendant's trial counsel were in fact properly made. There was no hint of any promise, threat or attempted coercion. At the hearing held pursuant to the order of Judge Metzner, Judge Clyne revealed certain information which explains the statements made. According to Judge Clyne, when asked if there had been any plea bargaining negotiations, "Mr. Lanna (defense counsel) indicated that the District Attorney's Office didn't care to talk to him" and it was then that he asked the District Attorney to "review the matter" (164a).[7] As to possible sentence, the Judge revealed, "I advised both attorneys that I did not believe I would accept a plea below felony level and that my present inclination at that juncture was to incarcerate" (164a) and "I pointed out to Mr. Lanna at that time that things could possibly be worse, bearing in mind that if the Defendant were to plead guilty to a single felony, sentence would be imposed accordingly. If there were multiple felony convictions, obviously, that would be

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[7] While that explanation might indicate a hint of coercion, it would be against the prosecutor and to the benefit of the defendant.

a factor in the final sentence imposed" (165a).[5] Judge Clyne proceeded in a perfectly proper manner and it is for that reason that the defendant is left to his blunderbuss attack.

There is nothing in the record to even suggest that the defendant may have received a harsher sentence because he stood trial, and not because the sentence was warranted, in part, by the evidence adduced at trial (compare: *People* v. *Selikoff, supra*). The testimony at trial showed parents proudly having their 10-12 year sons participate in a well organized national football league only to learn that over a substantial period of time the coach was sodomizing those sons. The players having been taught to respect their coaches and to learn to play their best, were, in attempting to do what they had been taught was right, victimized by the defendant. The gory details of both physical and psychological abuse to these young boys would make even the coldest of persons believe that the defendant warrants more punishment than one who merely admitted that he "being 18 years of age or more engaged in deviate sexual intercourse with one Patrick Doe (Anonymous) a person less than 14 years old." Judge Clyne, at the hearing stated, "No matter what the plea bargaining discussions were prior to trial, in no way did the fact that the defendant went to trial play any part in the sentence in this case other than the possibility that having viewed the victims as they testified, watching some of the boys break down and cry, obviously I as a human being have to give my thoughts through my sentence, so everything I hear has an impression on my mind" (175a). The number of the crimes of which the defendant was

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[5] The defendant's conclusion (p. 25, brief) that "Judge Clyne has now denied the critical portion of Mr. Lanna's affidavit", is framed to make it appear that the basis of the conclusion is the words of Judge Clyne. The conclusion is not so based but is instead based upon the words and conclusions of defense counsel, Mr. Cohn (171a).

convicted and the details disclosed at trial clearly warranted the term imposed.

In the State of New York, the Appellate Division has the power to review the sentence imposed and to, in an appropriate case, reduce that sentence. The defendant argued eloquently before that court that his sentence should be reduced and the Court answered his plea by modifying the terms to make them concurrent. The Court, of course had the power to reduce the sentence to a term of probation but determined that the term of incarceration was the appropriate sentence.[9] There can be no question that the defendant's sentence which was, in effect, imposed by the Appellate Division was properly imposed.

POINT II

The sentence imposed was a proper one.

It is apparently the defendant's contention that any sentence of incarceration is cruel and unusual punishment, fortunately that is not the law.

In his brief (p. 29), the defendant concludes, "Fielding suffers from a medically identifiable emotional illness—pedophilia—which is both treatable and curable" His psychiatrist Dr. Zales disagrees. According to Dr. Zales, "I can state with professional sincerity that Mr. Fielding is no longer a Pedophiliac" (affidavit dated May 27, 1976 submitted to the Appellate Division) and "this emotional and mental defect is curable and I can report that at present petitioner no longer suffers from pedophilia (affidavit dated August 18, 1976 submitted to the Appellate Division).

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[9] Compare: *People* v. *Mosher*, 24 A.D.2d 47, 263 N.Y.S.2d 765 (1965) relied upon by the defendant in the Appellate Division both on appeal and on motion for a discretionary reduction. In that case a defendant, convicted of a single incident had his sentence reduced by the Appellate Division from one of incarceration to one of probation.

The defendant next concludes that "there is no correctional institution in the State of New York with the facilities either to treat Fielding or to ensure his physical safety." These conclusions are based upon conclusions by his psychiatrists with no factual basis.[10] An examination of the defendant's psychiatric reports will show that his experts conclude that he is in need of therapy and that therapy must be with Dr. Zales, no other psychiatrist will do. (There is no indication that Dr. Zales has sought and been refused permission to treat the defendant while he is in a state institution.) As to the defendant's physical safety, it need only be noted that numerous defendants have survived a period of incarceration, even those convicted of similar crimes. More people are injured in the home than any place else.

Imprisonment in a state institution is not designed solely for the defendant's benefit, but "to insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, and their confinement when required in the interests of public protection" (§ 1.05 PL).

> "This Court has never held that anything in the Constitution requires that penal sanctions be designed solely to achieve therapeutic or rehabilitative effects . . ."

Powell v. *Texas*, 392 U.S. 514 (1968).

Imprisonment of a pedophiliac for the crimes of which he has been convicted is constitutionally permissible (*Powell* v. *Texas*, *supra*; *People* v. *Davis*, 33 N.Y. 2d 221 (1973), cert. den. 416 U.S. 973.

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[10] See: § 148 Correction Law.

Conclusion

The matter should be remanded to the District Court with a direction to summarily dismiss the defendant's petition or in the alternative affirmed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Jerry N. Simmons, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 25 Elliott Place, Bronx, New York 10452
That on November 8, 1976, he served 3 copies of BRIEF OF RESPONDENT-APPELLEE-APPELLANT
on

Paul, Weiss, Rifkind, Wharton & Garrison, Esqs.
345 Park Avenue
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Hon. Louis J. Lefkowitz
Two World Trade Center
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by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Jerry N. Simmons

Sworn to before me this
8th day of November, 1976

John [illegible]

[illegible] New York
[illegible] County
Commission Expires March 30, 1977